

U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 30 December 2003

CASE NO.: 2004-AIR-1

In the Matter of

DEBRA WINTRICH,
Complainant

v.

AMERICAN AIRLINES, INC.
Respondent

RULING AND ORDER GRANTING RESPONDENT'S MOTION TO DISMISS

On July 22, 2003, Complainant Debra Wintrich filed a complaint with the United States Department of Labor's Occupational Safety and Health Administration (OSHA), which alleged her employer, Respondent American Airlines, Inc., violated the employee protection or "whistleblower" provisions of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR 21). 49 U.S.C. 42121 *et seq.*¹

FACTUAL AND PROCEDURAL HISTORY

On September 10, 2003, OSHA's findings dismissed Wintrich's complaint stating that the complaint was not timely filed. On October 10, 2003, Complainant objected to OSHA's findings and requested a hearing. I was assigned the case on October 20, 2003.

On October 29, 2003, the undersigned issued a Notice of Hearing and Pre Hearing Order, which preliminarily set February 18, 2004 as the hearing date in the present matter.

On December 10, 2003, the undersigned received Respondent American Airlines, Inc.'s Motion to Dismiss. Respondent moved that Wintrich's complaint be deemed untimely and dismissed. The Complainant did not respond to the motion.

¹ Wintrich's complaint alleged that she was terminated for having voiced safety concerns in regards to agents of American Airlines not receiving training on dangerous goods and false information in computer records of American Airlines that agents received training when they had not. Wintrich believes that she was terminated on June 3, 2002 because of such complaints to the customer service manager.

ISSUES

Essentially, two issues have been raised by Respondent's Motion to Dismiss. Those issues are:

1. Whether Complainant timely filed her claim with OSHA?
2. Whether, under the facts of this case, equitable tolling will apply to deem the filing of her claim timely?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Timeliness of Claim

Complainant states she was terminated on June 3, 2002. She filed an internal grievance contesting the removal and a mediator was appointed. The mediator found her removal unjust but did not reinstate her position. Complainant did not file her complaint until July 22, 2003. Complainant asserts that her claim is not time-barred because it was filed within 90 days of the decision by American Airlines not to reinstate her to her position.

Pursuant to AIR 21, a complaint filed under the employee protection provision must be filed not later than 90 days after the date on which the violation occurs. 49 U.S.C. 42121(b)(1). 29 C.F.R. 1979.103(d). The date of the postmark, facsimile transmittal, or e-mail communication will be considered to be the date of filing. 29 C.F.R. 1979.103(d). The date which commences the limitations period is the date when the discriminatory decision has been both made and communicated to the complainant. Thus, it is when the employee is aware or reasonably should be aware of the employer's decision. *See Delaware State College v. Ricks*, 449 U.S. 250, 258 (1990); *Equal Employment Opportunity Commission v. United Parcel Service*, 249 F.3d 557, 561-62 (6th Cir. 2001).

Moreover, "[t]he filing period commences on the date that Complainant is informed of the challenged employment decision rather than at the time the effects of the decision were ultimately felt." *Ballentine v. Tennessee Valley Authority*, 1991-ERA-23, (Sec. Final Dec. and Order of Dismissal, Sept. 23, 1992); *citing Howard v. Tennessee Valley Authority*, 1990-ERA-24, (Sec. Final Dec. and Order of Dismissal, July 3, 1991), slip op. at 2-3, *aff'd sub nom. Howard v. U.S. Department of Labor*, 959 F.2d 234 (6th Cir. 1992).

Under AIR 21, failure to file within the limitations period warrants dismissal of the complaint. *See Swint v. Net Jets Aviation Inc.*, 2003-AIR-26 (ALJ July 9, 2003) (respondent's motion to dismiss claim granted based on complainant's failure to file hearing request and objections within 30 days of OSHA's findings).

The date which commenced the 90-day period was June 3, 2002, the date the Complainant was notified of her termination. It is not the date based upon the internal investigation of her removal the American Airlines appointed mediator decided that she would not be reinstated. The termination decision was communicated to Complainant on June 3, 2002.

Thus, Complainant had 90 days from June 3, 2002 to file her complaint. Complainant filed her complaint on July 22, 2003, well beyond the 90-day limitations period.

2. Tolling of the Limitations Period

Complainant argues that the internal investigation of her removal as compliance coordinator tolls the AIR 21 limitations period. This argument would permit her to file within 90 days of the completion of the internal investigation.

The principles of equitable tolling are generally applicable to whistleblower cases. The general principle mandating strict construction of filing periods in whistleblower cases will apply, unless a complainant can demonstrate the right to avail him or herself to the principle of equitable tolling. *Howlett v. Northeast Utilities Company*, 1999-ERA-1 (ALJ, December 28, 1998). There are three specific instances where equitable tolling has been applied to time limitations for the filing of an appeal in whistleblower cases. First, where the employer has actively concealed or misled the employee. *English v. Whitfield*, 858 F.2d 957, 963 (4th Cir. 1988). See *School District of the City of Allentown v. Marshall*, 657 F.2d 16, 20 (3rd Cir. 1981); *Hill v. Department of Labor*, 65 F.3d 1331, 1335 (6th Cir. 1995). Second, where the employee was prevented from asserting his right in some extraordinary way. See *Smith v. American President Lines, Ltd.*, 571 F.2d 102, 109 (2nd Cir. 1978); *Crosier v. Westinghouse Hanford Company*, 1992-CAA-3 (Sec'y, January 12, 1994). Third, where the complainant raised the precise statutory claim in the wrong forum. *City of Allentown*, 657 F.2d at 20. See *Gutierrez v. Regents of the University of California*, 1998-ERA-19 (ARB, November 8, 1999).

On June 3, 2002, Complainant was given final and unequivocal notification that her position was terminated. The fact that she was permitted to file an internal appeal does not delay the commencement of the running of the statute of limitations. There is no evidence that the conduct of the Respondent warrants equitable tolling of the statute of limitations.

Pursuant to AIR 21, the complaint must be filed within 90 days of the violation. The violation under AIR 21, alleged by Complainant, was removal as compliance coordinator, not the decision made by the arbitrator. Thus, the date of the violation was June 3, 2002.

CONCLUSION

In conclusion, Complainant did not file within the 90-day limitation period. The filing of an internal grievance does not toll the limitations period. Therefore, the complaint was filed untimely.

ORDER

It is hereby ordered, Respondent's Motion to Dismiss is GRANTED and Complainant, Debra Wintrich's claim is hereby DISMISSED, and the hearing scheduled for February 18, 2004, in Columbus, Ohio, is hereby CANCELLED.

A

RICHARD A. MORGAN
Administrative Law Judge

NOTICE OF APPEAL RIGHTS: This decision shall become the final order of the Secretary of Labor pursuant to 29 C.F.R. 1979.110 (2002), unless a petition for review is timely filed with the Administrative Review Board ("Board"), U.S. Department of Labor, Room S-4309, 200 Constitution Avenue, NW, Washington DC 20210. Any party desiring to seek review, including judicial review, of a decision of the administrative law judge must file a written petition for review with the Board, which has been delegated the authority to act for the Secretary and issue final decisions under 29 C.F.R. Part 1979. To be effective, a petition must be received by the Board within 15 days of the date of the decision of the administrative law judge. The petition must be served on all parties and on the Chief Administrative Law Judge. If a timely petition for review is filed, the decision of the administrative law judge shall be inoperative unless and until the Board issues an order adopting the decision, except that a preliminary order of reinstatement shall be effective while review is conducted by the Board. The Board will specify the terms under which any briefs are to be filed. Copies of the petition for review and all briefs must be served on the Assistant Secretary, Occupational Safety and Health Administration, and on the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor, Washington, DC 20210. See 29 C.F.R. 1979.109(c) and 1979.110(a) and (b).